error, (2) Ohio was not party to the proceedings, and (3) Ohio has always contested the placement of Kentucky's boundary at the low water mark on the northern shore. Basically, Ohio argues that Virginia never held good title to the lands she surrendered to the United States and therefore Virginia, and her successor, Kentucky, never had title to more than the middle of the River.

In the more than 150 years since the Court's decision in *Handly*, Kentucky has consistently claimed ownership to and exercised dominion over the Ohio River to the low water mark on the northern shore. Ten years before *Handly* was decided, the Kentucky Legislature enacted a statute to quiet questions over the extent of its ownership on the Ohio River which clearly set forth its claim of sovereignty over it. The act stated:

> "Whereas doubts are suggested, whether the counties, calling for the River Ohio as the boundary line, extend to the state line, on the north west side of said river, or whether the margin of the south east side, is the limit of the counties, to explain which
>
> "Sec. 1 *Be it enacted, by the General Assembly*, That each county of this Commonwealth, calling for the river Ohio, as the boundary line, shall be considered as bounded in that particular by the state line on the north west side of said river, and the bed of the river and the islands, therefore shall be within the respective counties, holding the main land opposite thereto, within this State, and the several county tribunals, shall hold jurisdiction accordingly."[13]

Similar language by the Revisor of the Kentucky Statutes in 1944 contained the comment:

> "The boundary with Ohio, Indiana, and Illinois begins at a point where a line running through the center of

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13. 1 Statute Law of Kentucky 303 (1834). See, Laws of Kentucky 189 (1810).

the Big Sandy River intersects the low water mark on the northern shore of the Ohio River; thence it runs in a westerly direction along the northern or northwestern shore of the Ohio, to a stake on the bank of the Ohio river . . . ."[13]

Decisions of the Kentucky courts, however, demonstrate her continuing claim to the waters of the Ohio River.[14]

During the long period following *Handly*, the Court on several occasions affirmed and followed its holding in that case. In *Indiana v. Kentucky*[15] a dispute between the States of Kentucky and Indiana over a claim of ownership to an island on the north side of the Ohio River again raised the question of the limits of Kentucky's sovereignty over the River. After reviewing the events surrounding Virginia's claim to the northwest territory, and the cession of Virginia in 1784, the Court, relying on *Handly*, concluded that Kentucky "succeeded to the acient right and possession of Virginia"[16] and that its boundary extended to the low water mark on the northern shore of the River.

Henderson Bridge Co. v. Henderson City,[17] decided nine years after *Indiana v. Kentucky*, involved a determination of the extent of power of a Kentucky municipality to tax a railroad bridge spanning the river between Kentucky and Indiana, which raised the issue of the extent of dominion Kentucky possessed over the River. After dis-

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13. Notes and Annotations to the Kentucky Revised Statutes (1944), Title I, Chapter I, p. 2.

14. *Commonwealth v. Henderson County*, 371 S.W.2d 27 (1963); *Louisville Sand & Gravel Co. v. Ralston*, 266 S.W.2d 119 (1954); *Shannon v. Streckfus Steamers*, 279 Ky. 649, 131 S.W.2d 833 (1939); *Church v. Chambers*, 3 Dana 279; *McFarland v. McKnight*, 6 B. Mon. 500, 510; *Fleming v. Kenny*, 4 J. J. Marsh 155, 158; *McFall v. Commonwealth*, 2 Met. (Ky.) 394.

15. 136 U.S. 479 (1890).

16. *Id.* at 508.

17. 173 U.S. 592 (1899).

cussing *Handly*, *Indiana v. Kentucky*, and their historical background, the Court held that:

> "Upon this question of boundary nothing can be added to what was said in the cases cited, and it must be assumed as indisputable that the boundary of Kentucky extends to low-water mark on the western and northwestern banks of the Ohio River."[18]

Also, in a memorandum decision, the Court in *Nicoulin v. O'Brien*,[19] held that Kentucky could prohibit citizens of Indiana from seining for fish in the River south of the low water mark on the northern shore, stating that the "territorial limits of Kentucky extend across the river to low-water mark on the northerly shore."[20] Other cases which involved the location of state boundaries and the sharing of jurisdiction on River waters, have also discussed and followed the reasoning in *Handly*.[21]

Despite the long passage of time, the legislative and judicial pronouncements of the State of Kentucky, and the decisions of the Supreme Court, holding Kentucky's boundary at the low water mark on the northern shore, Ohio only now asserts the claim that its dominion extends to the middle of the River. As a defense to this extended period of inaction, the petition to amend alleges, as mentioned above, that Ohio is not bound by the decisions of the Supreme Court because it was not a party to those proceedings and has always protested the presently fixed boundary of Kentucky. Ohio cites several cases to support this position. Yet, they only strengthen the contrary conclusion, that the Ohio courts have, for many years, followed the reasoning of *Handly* and accepted Kentucky's territorial limits as being at the low water mark on the northern shore of the River.

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18. Id. at 615.
19. 268 U.S. 113 (1918).
20. Id. at 114.
21. Wedding v. Meyler, 192 U.S. 573 (1904); Alabama v. Georgia, 23 How. 505, 514 (1850).

Booth v. Hubbard,[22] one of the cited cases, was a wrongful death action brought after the drowning of plaintiff's decedent in the Ohio River. It was argued that the decedent had died within the territorial limits of Kentucky and, therefore, the action could not be maintained in the Ohio courts. The Supreme Court of Ohio, in discussing where the boundary lay between Kentucky and Ohio, stated that:

> "For all the purposes of this case, it may be assumed that Virginia was the original, undisputed owner of the territory on both sides of the river, and still retains all that she did not part with by her deed of cession in 1784."[23]

The court went on to discuss the interpretation of the Cession of Virigina in *Handly*, stating further that:

> ". . . the construction thus given to the Virginia deed of cession has been uniformly sanctioned and affirmed by the courts of this state. In Lessee *of McCullock v. Aten*, 2 Ohio Rep. 308, the court say: 'The state is bounded by the Ohio River; but it can scarcely be supposed that the beach, below the break of the bank, is not within her jurisdiction. In the case of *Handly's Lessee v. Anthony*, this doctrine is distinctly recognized by the supreme court of the United States, as being a rule of boundary. And it is one to which this court have always adhered.'"
>
> * * *
>
> "The construction given to the Virginia deed of cession by the supreme court of the United States, having been thus acquiesced in and acted on by the courts, both of Virginia and Ohio, may be regarded as decisive of the question."

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22. 8 Ohio St. 243 (1858).
23. Id. at 245.

"In point of fact dominion has never been exercised by Virginia on this side of the river, since her deed of cession, but has uniformly been exercised by this state, to the line of low-water, during the whole period of her existence, and the question should now be regarded as settled."[24]

Although not cited by Ohio, *Blanchard v. Porter*,[25] decided more than 25 years earlier than *Booth v. Hubbard*, contained similar reasoning. There the issue before the Supreme Court of Ohio was whether a citizen of Ohio could convey by deed the land between the high and low water marks on the Ohio River. In the course of its reasoning the court stated:

> "Nor is it a question, whether the deed to the plaintiff conveys the land and water, to the centre of the river, since Virginia only granted the territory on the northern bank of the river, to low water mark; although, by the compact of 1792, between Virginia and Kentucky, a *concurrent jurisdiction* over the river is accorded to Ohio and Kentucky." (Emphasis in original).[26]

And, citing this case and others in *Wedding v. Meyler*,[27] the Supreme Court observed that "In the Ohio decisions, it is apparent that the jurisdiction exercised by the State over the Ohio River is based on the Virginia compact."[28]

In two other cases introduced by Ohio, the first, *Sebastian v. Covington & Cincinnati Bridge Co.*,[29] involved a question of the extent of Ohio's power to tax a bridge which had been built by a Kentucky corporation chartered by the State of Ohio for that purpose, and the

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24. 12 at 247-48.
25. 11 Ohio 138 (1841).
26. 11 at 148.
27. 148 U.S. 573 (1894).
28. 14 at 576-77.
29. 23 Ohio St. 951 (1873).

second, *Covington & Cincinnati Bridge Co. v. Mayer*,[30] raised the issue of the extent of Ohio's taxing power over the same bridge pursuant to a revised Ohio statute which had altered the property base for taxation. In both cases counsel argued that Ohio's southern boundary lay at the middle of the river and its power to tax was coextensive thereto. The decisions of the Supreme Court of Ohio, however, concluding respectively that Ohio could tax the bridge to the middle of the River, and determining the appropriate property base for the tax, relied on provisions in the Ohio charter which granted permission for the building of the bridge. The court did not reach the question of where the boundary lay between the states. The other cases cited by Ohio to support the contention that it has always protested the placement of Kentucky's boundary at the low water mark on the northern shore also rely merely on counsels' arguments not reflected in the decisions of the courts.[31]

The acceptance by the Ohio courts of the Supreme Court's decisions in *Handly* and *Indiana v. Kentucky* setting the boundary of Kentucky at the low water mark on the northern shore undermines its contention that it is not bound by them because they involved conflicts between Indiana and Kentucky wherein Ohio was not a party. In addition, Ohio's assertion that those decisions were intended to locate the northern boundary of Kentucky on the Ohio River only as between Indiana and Kentucky assumes that the cession of the northwest territory and the Ordinance of 1787 contemplated different boundaries for the states to be carved on the north-

30. 11 Ohio St. 317 (1877).

31. Ohio refers to the brief for the State of Indiana in *Indiana v. Kentucky*, 136 U.S. 479 (1890) wherein it was "pointed out that . . . Ohio claimed that its boundary . . . lay in the middle of the Ohio River, and that Ohio regarded . . . language on that aspect of the *Handly* case as dicta." Ohio also refers to the argument for the State of Ohio in *Commonwealth v. Garner*, 44 Va. 655 (1846). Plaintiff's Brief in Support of Amended Complaint at 15-17.

boundaries. Such a plan would have resulted in a checkered River border for Virginia and little Kentucky. Aside from the sheer difficulty and practical unmanageability inherent in governing a border such as Ohio's argument suggests, this contention appears to be contrary to the intentions of the Congress and the states which participated in planning for the division of the northwest territory into states. It must be assumed that the adjudications in Kentucky and Indiana v. Kentucky, although resolving conflicts only between the States of Indiana and Kentucky, were intended to locate the boundary of Kentucky along its entire northern border. At the very least, Ohio was put on notice of the practical intent and consequences of these decisions and the jeopardy they posed to its claim of dominion on the River.

In holding that Kentucky was the rightful owner of the island in dispute in Kentucky v. Indiana, the Court reasoned:

> Above all the evidence of former transactions and of ancient witnesses, and of geological speculations, there are some uncontroverted facts in the case which lead our judgment irresistibly to a conclusion in favor of the claim of Kentucky. It was over seventy years after Indiana became a State before this suit was commenced, and during all this period she never asserted any claim by legal proceedings to the tract in question. She states in her bill that all the time since her admission Kentucky has claimed the Green River Island to be within her limits and has asserted and exercised jurisdiction over it, and thus excluded Indiana therefrom, in defiance of her authority and contrary to her rights. Why then did she delay to assert by proper proceedings her claim to the premises? On the day she became a State her right to Green River Island, if she ever had any, was as perfect and complete as it ever could be . . . On that day, and for many years

afterwards, as justly and forcibly observed by counsel, there were perhaps scores of living witnesses whose testimony would have settled, to the exclusion of a reasonable doubt, the pivotal fact upon which the rights of the two States now hinge and yet she waited for over seventy years before asserting any claim whatever to the island, and during all those years she never exercised or attempted to exercise a single right of sovereignty or ownership over its soil. . . ."

"This long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority."[32]

The Court concluded by stating that:

"The long acquiescence of Indiana in the claim of Kentucky, the rights of property of private parties which have grown up under grants from that State, the general understanding of the people of both States in the neighborhood, forbid at this day, after a lapse of nearly a hundred years since the admission of Kentucky into the Union, any disturbance of that State in her possession of the island and jurisdiction over it."[33]

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32. 139 U.S. at 509-510.
33. 139 U.S. at 518.

The [illegible] seemed [illegible] in the daily course of dealings [illegible] between the States and their citizens to which the Court was responsible in [illegible] v. Kentucky upon a lapse of [illegible] seventy years, and even more compelling [illegible] the present case involving a lapse of more than 100 years. The considerations which Kentucky introduced to avoid previous precedent [illegible] are examples of the [illegible] elements of proof the proposed amendment to Ohio's complaint would create. Moreover, the reasoning and principles expressed in Indiana v. Kentucky have been followed by the Supreme Court to deny relief in cases of long delayed state claims to territory in a line of decisions. Thus, in Michigan v. Wisconsin,[1] the Court refused to reverse a mistake in a boundary description which had deprived Michigan of her rightful territory on the grounds that Michigan had known of the error for some sixty-four years and had stood by without objection while Wisconsin exercised dominion over the land. The Court stated that:

> "It is contended that the State of Michigan through all these years labored under a mistake in respect of the real facts and that this was the result of excusable ignorance on her part. The contention is devoid of merit. The material facts, since at least the date of the Wisconsin Enabling Act, [1836] have been so obvious that knowledge of them on the part of the Michigan authorities, if it were not shown, as it is shown, by the evidence, must necessarily be assumed.
>
> "Notwithstanding, the State of Michigan at this late day insists that the boundary now be established by a decree of this court in accordance with the description contained in her Constitution of 1908. Plainly, this cannot be done. That rights of the character here claimed may be acquired on the one hand and lost on the other by open, long-continued

[1] 270 U.S. 295 (1926).

and uninterrupted possession of territory, is a doctrine not confined to individuals but applicable to sovereign nations as well, [citations omitted] and, *a fortiori*, to the quasi-sovereign states of the Union. The rule, long-settled and never doubted by this court, is that long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority."[35]

In the cases where the Court did not find acquiescence in state claims to disputed territory, the conflict over the boundaries was both obvious and of long standing.[36]

In light of the decisions of the Supreme Court and those of the Ohio Supreme Court recognizing and accepting the northern boundary of Kentucky at the low water mark on the northern shore of the River, and on the basis of Kentucky's open and continuous assertion and exercise of dominion to that point without formal objection by Ohio for more than 150 years, it is my opinion that the pronouncement of the Court in *Indiana v. Kentucky* applies equally to Ohio, and it has for all practical purposes acquiesced in Kentucky's claim of sovereignty over the River to the low water mark on the northern shore.

It seems clear that Ohio, in its present posture, harking back to an alleged ancient defect in Virginia's title to the northwest territory in order to vacate the decision in *Handly* and Kentucky's historically fixed boundary, is attempting to challenge a settled rule of law which has been accepted by it for a century and a half. Recognizing that great latitude is to be extended in cases

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35. Id. at 307-308. *Vermont v. New Hampshire*, 289 U.S. 593, 613 (1933); *Maryland v. West Virginia*, 217 U.S. 1, 42-44 (1910); *Louisiana v. Mississippi*, 202 U.S. 1, 53-54 (1906); *Virginia v. Tennessee*, 148 U.S. 503, 523 (1893); *Rhode Island v. Massachusetts*, 4 How. 591, 639 (1846).

36. *New Jersey v. Delaware*, 291 U.S. 361, 376-77 (1934); *Oklahoma v. Texas*, 272 U.S. 21, 46-47 (1926); *Arkansas v. Tennessee*, 246 U.S. 158 (1918).

involving litigation between the sovereign states.[7] It is nevertheless my opinion that the proposed amendment, in any view of its factual allegations, fails as a matter of law to state a cause of action.[8] I therefore recommend that an order be entered denying the petition to amend the complaint of the state of Ohio.[9]

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[7] Virginia v. West Virginia, 241 U.S. 117, 121 (1915).

[8] 3 Wright & Miller, Federal Practice and Procedure §1315, 1316, 1317 (1969); 2A Moore, Federal Practice ¶12.08 (2d ed. 1968).

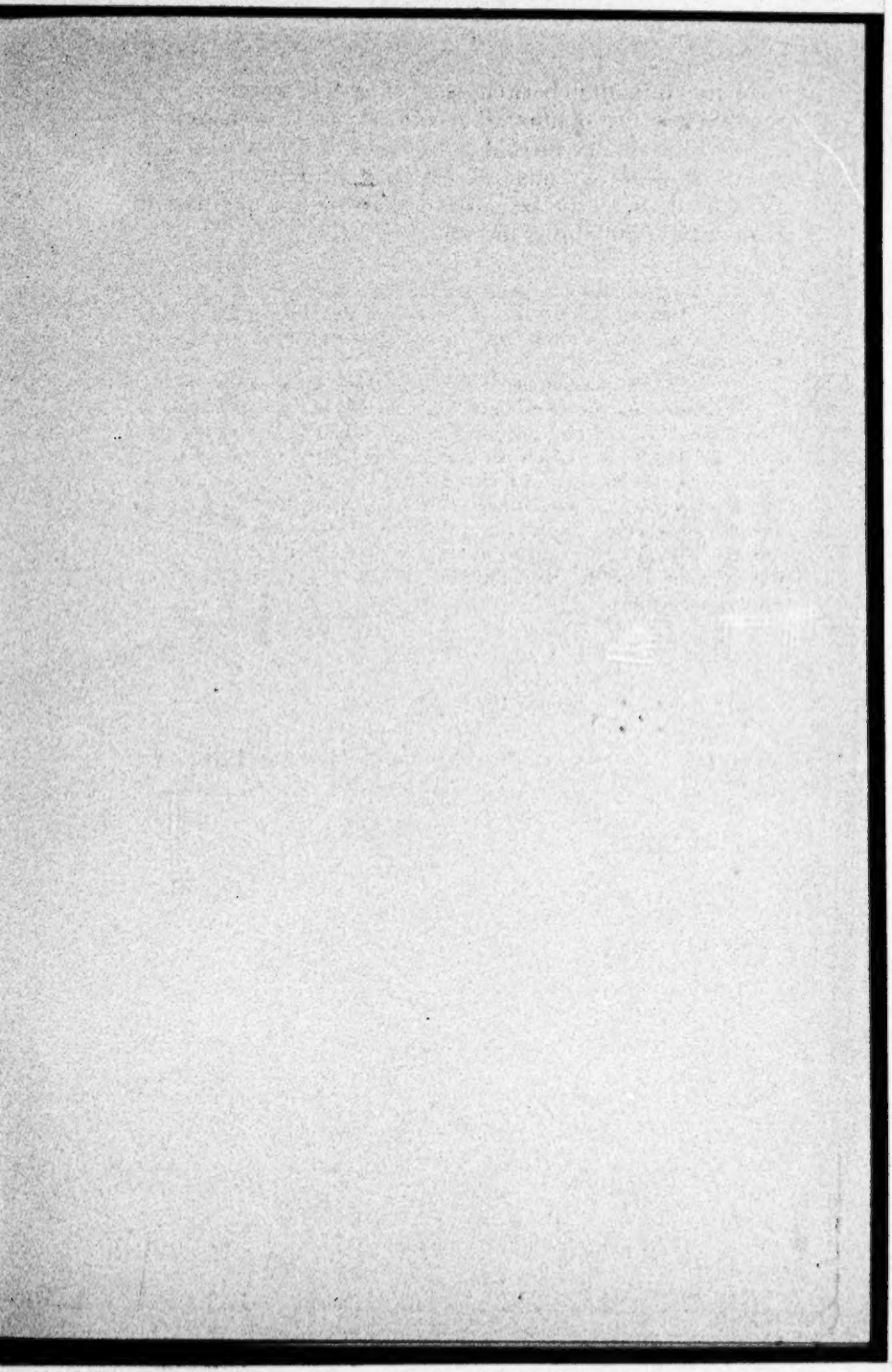
[9] Such a disposition of the petition to amend the complaint will not terminate this litigation since it contemplates but an alternative request for relief. Ohio intends to pursue its original cause of action to locate the boundary between the states at the low water mark on the southern shore of the River as it existed in 1792.

The necessity for a definitive resolution of the petition for leave to amend at this point, unfortunately enough it may be, appears justified from the standpoint of economy of time and expense as for the discretion of the application of 28 U.S.C. §1292(b) dealing with appeals of certain interlocutory orders.

Respectfully submitted,

/s/ PHILLIP FORMAN
Special Master

April 10, 1972



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In the Supreme Court of the United States

OCTOBER TERM, 1972

NO. 27, ORIGINAL

THE STATE OF OHIO, PLAINTIFF

v.

THE COMMONWEALTH OF KENTUCKY, DEFENDANT

EXCEPTIONS OF THE STATE OF OHIO TO THE REPORT OF THE SPECIAL MASTER FILED MAY 15, 1972

Pursuant to the Court's order,[1] the State of Ohio presents the following exceptions to the Report of the Special Master filed May 15, 1972:

1. The State of Ohio excepts to the conclusion that the factual allegations of the proposed amended complaint fail, as a matter of law, to state a cause of action (Rep. 15).

[1] On May 15, 1972, the Court ordered: "The Report of the Special Master upon the motion of the State of Ohio is received and ordered filed. Exceptions, if any, in the supporting briefs may be filed within sixty days. Reply briefs, if any, may be filed within thirty days of the receipt of the exceptions." On July 7, 1972, Mr. Justice Stewart extended the time for filing the exceptions and supporting brief of the State of Ohio to August 14, 1972. The Report will be referred to herein as "Rep".

2. The State of Ohio excepts to the recommendation that the motion for leave to file the amended complaint should be denied (Rep. 16).

Respectfully submitted,

WILLIAM J. BROWN
Attorney General of Ohio,

JOSEPH M. HOWARD,
Executive Assistant
to the Attorney General,

AUGUST 1972.

In the Supreme Court of the United States

OCTOBER TERM, 1972

NO. 27, ORIGINAL

THE STATE OF OHIO, PLAINTIFF

v.

THE COMMONWEALTH OF KENTUCKY, DEFENDANT

BRIEF OF THE STATE OF OHIO IN SUPPORT OF EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER FILED MAY 15, 1972

REPORT OF THE SPECIAL MASTER

The Report was filed in this Court on May 15, 1972. On that same date, the court ordered that any exceptions of the parties, with supporting briefs, be filed within sixty days. On July 7, 1972, Mr. Justice Stewart extended the time for filing the exceptions and supporting brief of the State of Ohio to August 14, 1972. The Court has original jurisdiction.

QUESTIONS PRESENTED

1. Whether the factual allegations of the proposed amended complaint state a cause of action.

2. Whether the motion for leave to file an amended complaint should be granted.

STATEMENT

This original action was initiated when the State of Ohio filed a complaint in this Court seeking a determination of the location of its boundary with the Commonwealth of Kentucky.[1] The only question presently before the Court is whether Ohio shall be permitted to file an amended complaint. The Special Master states in his Report:

> The propriety of permitting the proposed amendment to the complaint is the sole subject of this Report. (Rep. 8; see also Rep. 15-16.)

The Report finds (Rep. 3-4) that the federal and state enactments by which the two States were admitted to the Union simply described Kentucky as bounded on the north by the Ohio River, while Ohio was described as bounded on the south by the same River. Ohio has claimed that the boundary between the two States lies at the middle of the River; or, at least, that it lies at the low water mark on the northerly side of the River as it existed in 1792 when Kentucky became a State. Kentucky has claimed that the boundary lies at the present low water mark on the northerly shore. (A.C. 3.) The issue as to the exact location of the line has never been authoritatively decided in any court proceeding between the two States.

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[1] The complaint will be referred to as "C". The proposed amended complaint and the brief in support of the motion for leave to file, which are printed together in the same blue covered pamphlet, will be referred to, respectively, as "A.C." and "Br".

During the period from 1910 to 1929 the United States Government, acting through the Army Corps of Engineers, erected, for navigational purposes, a series of dams in the Ohio River. The result was a rise in the general water level and permanent inundation of various areas on the Ohio shore. From 1955 to the present time the Corps of Engineers has been replacing the original dams with new ones, designed to achieve better navigational conditions. These new dams are much higher and have produced a further rise in the level of the River. They are causing, and will continue to cause, the permanent inundation of much greater areas on the Ohio shore. (A.C. 3-4.)

The complaint of the State of Ohio was filed in this Court on March 31, 1966. The complaint admitted that the territory northwest of the Ohio River had been ceded to the United States by the Commonwealth of Virginia in her so-called Cession of 1789; that Virginia, as original proprietor of both banks of the River, retained a boundary line at the low water mark on the northerly side; that the Commonwealth of Kentucky, having been formed from Virginia, succeeded to Virginia's rights; and that this Court's decision in *Handly's Lessee* v. *Anthony*, 5 Wheat. 374 (1820), involving the line between Indiana and Kentucky, established Kentucky's boundary in the Ohio River. The complaint prayed that the boundary line between the two States be established at the low water mark on the northerly shore as that mark existed in 1792 (C. 2-4, 7-12).[3]

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[3] The complaint also prayed for a determination of the jurisdiction of the two States over the waters of the Ohio River (C. 4, 12-14). Under the terms of the Ordinance of July 13, 1787, by which Congress established a government for the territories of the United States northwest of the Ohio River, and under the terms of the Virginia-Kentucky Compact of 1789, which led to statehood for Kentucky, the two States had been granted "concurrent jurisdiction" over the River. The proposed amended complaint repeats the allegations of the original complaint on this branch of the case, but with some additions and clarifications (A.C. 7-8).

Kentucky's answer (p. 3) alleged that the boundary is the present low water mark on the Ohio shore. Furthermore, Kentucky's answer (p. 4), while conceding that Ohio's jurisdiction over the River is concurrent with her own, nevertheless insists that the jurisdiction of the State of Ohio is not joint and equal with that of the Commonwealth of Kentucky.

In view of the fact that the new high dams have the effect of elevating Kentucky's claimed border higher and higher up the Ohio shore, and in view of Kentucky's adamant refusal to consider any compromise, we have carefully researched the historical basis for Virginia's claim of title in 1784 to the lands north and west of the Ohio River, and we have carefully reexamined the reasoning of *Handly's Lessee* v. *Anthony*, *supra*. That reexamination and research led us to conclude that Virginia, in 1789, had no title to any of the land on the north bank of that part of the Ohio River which flows between Kentucky and Ohio; that Virginia surrendered nothing but a baseless claim by her so-called Cession; that Virginia was not, in 1784, the proprietor of both sides of the Ohio River; that the opinion in *Handly* simply assumed that Virginia was the original proprietor of both sides; and that, under the principles of boundary law laid down in *Handly*, the line between the Commonwealth of Kentucky and the State of Ohio lies in the middle of the River.

As a result of these conclusions, Ohio, on August 30, 1971, filed in this Court a motion for leave to file an amended complaint, attaching thereto the proposed new complaint and a brief in support of the motion. The brief made the following points: (1) that this Court will decide a boundary dispute between States on the merits wherever possible (Br. 11-13); (2) that the present controversy be-

tween Kentucky and Ohio has never been authoritatively decided (Br. 13-17); and (3) that the evidence to support the conclusion that the true boundary line between the two States lies in the middle of the Ohio River is overwhelming (Br. 17-20).[4] Kentucky filed an opposition to the motion, contending that, even if the facts newly alleged by Ohio were true, the boundary between the two States had been settled by this Court's decisions in *Handly's Lessee* v. *Anthony*, *supra*, and *Indiana* v. *Kentucky*, 136 U.S. 479 (1890), and that Ohio courts had recognized the authority of those cases. On November 9, 1971, this Court entered an order referring the motion to the Special Master. 404 U.S. 933.

On December 14, 1971, there was a hearing before the Special Master. Counsel conceded that Kentucky was not challenging the sufficiency or the truth of the allegations of the amended complaint (Tr. 4, 10, 33, 57).[5] He also

> • • • intimated that if permitted, the proposed amendment would necessitate the filing of a counterclaim for heavy expenditures made since 1792 north of the mid-point of the River. (Rep. 3; Tr. 12-13, 36-37.)

The Report of the Special Master recommends that an order be entered denying the petition for leave to amend the complaint (Rep. 16). The Report points out that *Handly's Lessee* v. *Anthony*, *supra*, was decided over 150 years

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[4] In the alternative the proposed amended complaint reiterates, with some amplification and clarification, the allegations of the original complaint to the effect that the boundary should, at least, be drawn at the low water mark on the northerly shore as it existed in 1792 (A.C. 6-7).

[5] References to the transcript of the hearing will be given as "Tr".

ago (Rep. 4-6); that Kentucky has always recognized that case as determinative of her boundary with Ohio (Rep. 6-7, 15); that *Handly* has been repeatedly followed in other decisions in this Court (Rep. 7-8); that various Ohio decisions seem to accept it (Rep. 8-11); and that this Court has said that long acquiescence by one state, in the exercise of dominion over territory by another, is conclusive of the latter's title (Rep. 12-15). In essence, the Report concludes that Ohio courts have, for many years, accepted the holding of *Handly* as determinative of the Kentucky-Ohio, as well as the Indiana-Kentucky, boundary line; and that in view of this long acquiescence, the proposed amendment to the complaint fails, as a matter of law, to state a cause of action (Rep. 15-16).

ARGUMENT

I. INTRODUCTION AND SUMMARY

This is the first case in which the location of the Kentucky-Ohio boundary line in the Ohio River has been squarely put in issue before any court. There are three possibilities: (1) the middle of the River; (2) the low water mark on the northerly shore as it existed in 1792; or (3) the north shore low water mark today. The second and third possibilities were raised by Ohio's original complaint and Kentucky's answer thereto. The only question now before this Court is whether Ohio shall be allowed to amend its complaint so as to raise the first of these three possible lines.

The Report of the Special Master recommends against allowance of the amendment on the basis of two conclusions (Rep. 15-16). The Report points out that the location of

the Indiana-Kentucky line has been before this Court on several occasions, and has been held to be the low water mark on the north side—without specification between the 1792 line and that of the present day (Rep. 6-8). See *Handly's Lessee* v. *Anthony*, 5 Wheat. 374 (1820), and *Indiana* v. *Kentucky*, 136 U.S. 479 (1890). Relying on language in several cases decided by The Supreme Court of Ohio, the Report first concludes (Rep. 15) that Ohio has long acquiesced in the *Handly* decision as determinative of Kentucky's northern border line, with Ohio as well as with Indiana. The Report then concludes (Rep. 15-16) that the factual allegations of the proposed amended complaint fail, as a matter of law, to state a cause of action. In our view, the first conclusion is not supported by the cases upon which it relies. The second conclusion does not follow from the first, and it is totally without support in the record.

The confusion in the Report is the result of Kentucky's confusion of two separate and distinct defenses—the defense of failure to state a cause of action, and the affirmative defense of estoppel. Whether the factual allegations of a complaint are sufficient to state a cause of action must be determined by examination of the allegations themselves. But that is not what happened here. Kentucky did not challenge the sufficiency of the new allegations, in themselves, to state a claim for relief. Instead, going outside the new facts alleged in the proposed amended complaint, Kentucky claimed, by way of confession and avoidance, that Ohio had acquiesced in this Court's decisions as to the boundary line between Indiana and Kentucky. Kentucky was, in effect, setting up an affirmative defense of estoppel. The Report, relying essentially on the language of three cases in The Supreme Court of Ohio, accepts Kentucky's argument.

This Court has said repeatedly that, in dealing with boundary disputes between two sovereign States of the Union, its guiding principle is to reach a decision on the merits, and that technical defenses such as estoppel and laches will be entertained only with the greatest reluctance. It follows that amendments to pleadings designed to lay before the Court the full scope of the dispute on the merits, are entitled to great lenience. The Federal Rules of Civil Procedure, to which this Court looks for guidance in cases over which it has original jurisdiction, lead to the same conclusion, for Rule 15(a) provides that a request to amend a pleading "shall be freely given when justice so requires." Furthermore, Rule 8(b) and (c) and Rule 12(b), when read in conjunction, provide that all affirmative defenses must be presented by a responsive pleading. An affirmative defense may not be raised by way of a motion to dismiss the complaint for failure to state a cause of action.

What happened here is that Ohio asked leave to amend the original complaint in order to allege facts underlying a new theory in support of the claim for relief. Ohio alleged historical facts and documents which lead to the conclusion that Virginia had no title to any of the territory north and west of the Ohio River, when, in 1784, she ceded to the United States all her "right, title, and claim" to such territory. Ohio pointed out that this Court's decisions in *Handly's Lessee v. Anthony*, *supra*, and *Indiana* v. *Kentucky*, *supra*, simply *assumed* that Virginia did have title to such territory in 1784; that those cases involved only the Indiana-Kentucky border line; and that there had never been an authoritative decision as to the Kentucky-Ohio line. Kentucky did not challenge the sufficiency of the new allegations to state a cause of action in themselves. In-

stead, she presented an affirmative defense based on Ohio's alleged acceptance of *Handly*, in certain decisions of its Supreme Court, as determinative of the Kentucky-Ohio line.

We respectfully submit that those cases do not support the reading given them by Kentucky. We further submit that, since the sufficiency of the allegations in the proposed amended complaint has not been challenged, leave should be granted to file the amended complaint and Kentucky should be given time to file an answer.

Although Kentucky has not seriously attempted to show that the allegations of the amended complaint are, in themselves, insufficient to state a cause of action,[6] we shall briefly outline the main evidence to support the conclusion that the boundary between Kentucky and Ohio lies in the middle of the River. We shall then set forth our reasons why the motion for leave to file the amended complaint should be granted.

II. THE FACTUAL ALLEGATIONS OF THE PROPOSED AMENDED COMPLAINT STATE A CAUSE OF ACTION.

A comparison of the original complaint with Ohio's proposed amended version will reveal that the latter contains numerous amplifications and clarifications of the matters already alleged in the former. For present purposes, however, we are concerned only with the new course of action alleged in the amended complaint. That amendment reads as follows (A.C. 4-6):

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[6] In addition to the affirmative defense of estoppel, Kentucky's brief in opposition to the motion for leave to amend suggested (pp. 3-4) that the boundary had been settled by various federal and state enactments leading up to Kentucky's admission to the Union. As we have already noted in the Statement above, the Report of the Special Master rejects this argument (Rep. 3-4).

1. The claim of the Commonwealth of Kentucky to a boundary at the low water mark on the northerly shore of the Ohio River is founded upon the fact that Kentucky was still a part of the Commonwealth of Virginia between 1774 and 1784, during the Revolutionary War and during the period when the United States were operating under the Articles of Confederation. At that time the Commonwealth of Virginia claimed title to the land on both sides of that part of the Ohio River which now flows between Kentucky and Ohio. This claim of title was violently opposed by many others of the thirteen original States, several of whom had conflicting claims of title to the same territory north of the Ohio River. The Continental Congress, fearing disintegration of the Union, refused to decide the question of title, and suggested that the individual States surrender their claims of title to the United States for the good of all. All of the claimant States eventually did so. Thus, the representatives of Virginia in the Continental Congress, on March 1, 1784, pursuant to an act of the General Assembly of the Commonwealth of Virginia, ceded to the United States, for the common good of all the States, all Virginia's 'right, title, and claim' to the land northwestward of the Ohio River. This act, known as the 'Cession of Virginia', was a compromise of Virginia's claim of title.

2. Despite its claim, the Commonwealth of Virginia actually had no title to the land north of that portion of the Ohio River which now flows between Kentucky and Ohio. Virginia's claim rested upon the terms of a charter issued by King James I to the London Company in 1609, which charter, beginning from certain specified points on the Atlantic coast, purported to grant to the Company all the continental lands 'from sea to sea, west and northwest.' It is obvious from historical records that King James had no conception of the distance between the Atlantic and the Pacific Oceans, and that he had no intention of granting such an enormous expanse of territory. Furthermore, regardless of the validity of Virginia's original claim, its extent was sharply curtailed by subsequent events. The charter of the London Company was revoked in 1624 and Virginia became a crown colony; shortly after 1650 the French moved into the middle of the continent and for almost a hundred years held control of the Mississippi and the Ohio valleys until driven out by the British during the French and Indian War; by the Treaty of Paris, which terminated that war in 1763, the French ceded to the British Crown the entire eastern Mississippi valley north of the Ohio River and west of the Allegheny Mountains; by a royal Proclamation, issued on October 10, 1763, the British Crown reserved all of that land to the Indian tribes which had assisted the British

in the war, and confined the American colonies to the eastern side of the Allegheny Mountains; by the Treaty of Fort Stanwix, concluded between the British Crown and the Indians of the Six Nations, in November, 1768, the boundary between the Indian lands and the colonies was pushed westward across the mountains to a line drawn from northwestern Pennsylvania down the Allegheny and the Ohio Rivers, but the colonists were still forbidden to go north and west of that line; and by the Quebec Act, enacted by parliament and approved by the Crown in 1774, all the territory north and west of the Ohio River was made a part of the Province of Quebec.

3. The commonwealth of Virginia did not, at the time of its so-called Cession, have title to the land on the north side of that part of the Ohio River which now flows between Kentucky and Ohio. Virginia was not, therefore, the common proprietor of both sides of the Ohio River, and its boundary ran at most, in the middle of the River. The Commonwealth of Kentucky, being successor to Virginia, is entitled to no more.

The principles of the law of boundaries between States were formulated by this Court, in reliance on international law, in *Handly's Lessee* v. *Anthony*, *supra*. That case involved the line between Indiana and Kentucky, and it arose from a dispute between two private parties over a tract of land projecting into the River from the Indiana side, the one party claiming under a grant from Kentucky,

the other, from Indiana. This Court said (5 Wheat. 379):

> When a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one State is the original proprietor, and grants territory on one side only, it retains the river within its own domain, and the newly-created State extends to the river only. The river, however, is its boundary.

The opinion then explains that, in the latter case, the boundary of the original proprietor state extends to the low-water mark on the side of the newly-created state. 5 Wheat. 375-385.

For present purposes, the crucial point, to which we have already adverted in Section I, *supra*, is that the opinion simply *assumes* that Virginia was the original proprietor of both the south and the north sides of the Ohio River. The opinion goes no further into that question than to state (5 Wheat. 376):

> Both Kentucky and Indiana *were supposed* to be comprehended within the charter of Virginia at the commencement of the war of our revolution. (Emphasis supplied.)

We respectfully submit that the historical facts and documents, upon which the amended complaint is based, lead inevitably to the conclusion that the Court's assumption was erroneous, and that, if the principles of *Handly* had been applied to the actual facts, Virginia's boundary would

have been found to extend, at most, to the middle of the River.'

The main evidence to support the allegations of the amended complaint may briefly be summarized as follows:

The claim of the Commonwealth of Kentucky to practically the entire Ohio River, through that portion of its course which runs between Ohio and Kentucky, rests upon Virginia's ancient claim of title to the land which lies north of that section of the River (Rep. 7). Virginia's claim of title rests, in turn, essentially upon one British document—the charter granted to the London Company in 1609 by King James I, the terms of which were broad enough to include a vast tract from the Atlantic to the Pacific including what ultimately became the Northwest Territory. 1 Hening's Stat. at Large, 80, 88.[4]

It seems obvious from historical records that King James had no conception, in 1609, of the distance between the Atlantic and the Pacific Oceans, and that he had no intention of granting such an enormous expanse of territory. Chief Justice Marshall, in opinions for the Court, has

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[3] As Mr. Justice Brewer noted in *St. Joseph & G.I.R.R. Co. v. Daveruaz*, 41 Fed. 14 (1889), while he was still a district judge, the assumption in the *Handly* opinion was only a dictum which had no effect upon the actual decision of the case. Since the land in question lay above the low water mark on the Indiana side, there was no need to determine the exact location of the boundary between the two States. Regardless of whether the boundary lay in the middle of the River or at the north low water line, the land in dispute was a part of Indiana. 5 Wheat. 373-382.

Moreover, it does not appear that the Indiana party made any argument that the Indiana boundary extended to the middle of the River, or that he challenged the assumption of Virginia's title to the Northwest Territory. This was, of course, unnecessary in view of the outcome.

[4] In the controversial shell case, presently pending before this Court, Virginia does relies on the 1609 charter. *United States v. Maine, et al.*, No. 83, Original, pending before a special master on the United States' motion for judgment on the pleadings.

characterized such grants as "extravagant and absurd." *Worcester* v. *Georgia*, 6 Pet. 515, 544 (1832), and *Johnson* v. *McIntosh*, 8 Wheat. 543, 582 (1823). But, whatever may have been the validity of the original grant, other British documents show that the 1609 charter was revoked and that the western boundary of the Colony of Virginia was sharply restricted.

In 1624 the King, dissatisfied with the London Company's management of the colony, instituted a *quo warranto* proceeding which resulted in a decree revoking the charter, and Virginia became a Crown colony. 1 Marshall, *George Washington*, p. 56; 2 Hening's Stat. at Large, 525-526; 1 Laws of the United States, 465 (B. & D. ed. 1815). Thereafter, the French, moving down from Canada and up from New Orleans, took over the middle of the continent for more than a hundred years, until driven out by the British in the French and Indian War which lasted from 1756 to 1763. By the Treaty of Paris, terminating that war in 1763, the French ceded to the British Crown the entire eastern Mississippi valley north of the Ohio River and west of the Allegheny Mountains. 1 Laws of the United States, 441-442 (B. & D. ed. 1815); Shortt and Doughty, Documents Relating to The Constitutional History of Canada, 1759-1791, p. 86. No part of that territory north of the Ohio River was ever thereafter attached by the Crown to the Colony of Virginia.[9] On the contrary, a few months after the Treaty of Paris, the Crown issued the Proclamation of October 10, 1763, by which all the land west of the crest of the Allegheny Mountains was reserved for the Indian tribes who had assisted the British during the war,

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[9] The King had, of course, authority to fix the boundaries of Royal Provinces. *Vermont* v. *New Hampshire*, 289 U.S. 593, 600 (1932); *Johnson* v. *McIntosh*, 8 Wheat. 543, 580 (1823).

and the American colonies were specifically confined to the eastern slopes of the mountains. 7 Hening's Stat. at Large, 662, 666-668; 1 American Archives, Fourth Series, 172-176; 1 Laws of the United States, 443-448 (R. & D. ed. 1815); Illinois Historical Collections, Vol. X, *The Critical Period*, 1763-1765, pp. 39, 43-44. This caused great discontent among the colonists, and, as a result, the Crown, in November 1768, entered into the Treaty of Fort Stanwix with the Indians of the Six Nations, by the terms of which treaty the boundary between the Indian lands and the colonies was pushed westward across the mountains to a line running from northwestern Pennsylvania down the Allegheny and the Ohio Rivers. Again, the colonists were prohibited from crossing to the north and west of that line. The treaty was signed in the presence of a representative of Virginia. VIII Documents Relative to the Colonial History of the State of New York, pp. 135-137. Finally, in 1774, the Quebec Act, enacted by Parliament and approved by the Crown, annexed all the territory north and west of the Ohio River to the Province of Quebec. 1 American Archives, Fourth Series, 216-220, 914.

This brief outline indicates quite clearly that Virginia's western boundary, whatever may have been its original westward extent, had been sharply curtailed prior to the War of the Revolution. Indeed, it might be argued that Virginia's boundary lay at the low water mark on the *east* and *south* sides of the Ohio River, since the map which accompanies the text of the Treaty of Fort Stanwix in the citation just given shows the line drawn by that royal treaty running along the east and south bank of the River."

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[10] See also references to the same line on the south bank in later treaties between the United States and the Chickasaw Nation in 1786 and 1805. 1 Laws of the United States 583, 584 (R. & D. ed. 1815).

However, we think that the United States, which, upon the signing of the Declaration of Independence, succeeded to the rights of the British Crown in the territories north and west of the River, clearly intended the middle of the River to be the boundary between the old and the new states. Article 5 of the Ordinance of July 13, 1787, providing for the government of the territories northwest of the River, simply directed that the first three new states to be formed therein be bounded by the Ohio River,"[11] and Article 4 provided in pertinent part:"

> "***[t]he navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, import, or duty therefor.

The early laws of the United States speak repeatedly of Virginia, Kentucky and Tennessee as the lands south, or south and east, of the River, and of Ohio, Indiana and Illinois as the lands to the north, or the north and west.[12] In fact, in setting the boundaries of internal revenue districts in 1799, Congress provided for the creation of a district in Kentucky which should include all "the shores and waters on the *south side* of the River Ohio" from the Mississippi to the Cumberland, while the District of Ohio

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[11] 1 Laws of the United States 475, 480 (B. & D. ed. 1815).

[12] Ibid., 479-480.

[13] See, e.g., Laws of the United States, *supra*, Vol. 2, pp. 14, 104, 138, 179, 311, 421, 451, 533; Vol. 3, pp. 367, 385, 396, 596, 612.

should include "all the waters, shores, and inlets, of the river Ohio, on the *northern side* ***." 3 Laws of the United States 140, 151 (Emphasis supplied). It is most improbable that Congress would have set such boundaries for its own revenue districts unless it was satisfied that Kentucky's northern boundary went only to the middle of the River.[11]

Finally, it should be noted that Virginia's leaders were well aware of the flimsiness of her claim of title to lands north and west of the River. George Washington, writing to his agent, prior to the Revolution, about his own personal interest in lands beyond the Ohio River, clearly realized that he could not obtain a valid title thereto until the Royal Proclamation of October 1763 had been altered. The Washington-Crawford Letters, C.W. Butterfield, ed., pp. 1-5. And Madison, representing Virginia in the Continental Congress during the debate on the title claims of various states to the western lands, to which we shall refer in Section II (B) below, wrote to Jefferson, at that time Governor of the State, urgently requesting that documentary proof of Virginia's title be forwarded to him. 1 Papers of James Madison, H.D. Gilpin, ed., pp. 106-109, 119-124. Jefferson was unable to comply. Hinsdale, The Old Northwest, pp. 231-235.

In view of the foregoing, we respectfully submit that the allegations of the amended complaint were sufficient, as a matter of law, to state Ohio's claim to a boundary in the middle of the River. In *Cooley* v. *Gibson*, 355 U.S. 41 (1957), this Court said (at pp. 45-46):

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[11] We assume, from the course of this Court's decisions, that the middle of a river is the thalweg, or main channel of navigation. *Iowa* v. *Illinois*, 147 U.S. 1, 4-14 (1893); *Arkansas* v. *Mississippi*, 250 U.S. 39, 45 (1919); *New Jersey* v. *Delaware*, 291 U.S. 361 (1933); cf. *Arkansas* v. *Tennessee*, 397 U.S. 88 (1969), supplemented 398 U.S. 219 (1969). This is not a case like *Texas* v. *Louisiana*, No. 36, Original, pending on motion for judgment, in which the boundary between the two States was specifically described as "the middle" of the stream.

> ***[i]n appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.***

See also 5 Wright & Miller, Federal Practice and Procedure (1969 ed.) SS 1215, 1216, 1357.

III. THE MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT SHOULD BE GRANTED.

In the previous Section we have endeavored to show that the allegations of the proposed amended complaint clearly state a cause of action. We did so because the Report of the Special Master concluded (Rep. 15-16) that the amendment failed, as a matter of law, to state a claim. As noted in the Introduction and Summary above, this was a result of Kentucky's confusion of two distinct defenses—failure to state a claim and estoppel. What the Report really does is to accept Kentucky's suggestion that it has an affirmative defense to the amended complaint, i.e., an estoppel as a result of Ohio's long acquiescence in this Court's opinions in *Handly's Lessee* v. *Anthony* and *Indiana* v. *Kentucky*, *supra*. We respectfully submit that (A) this Court has repeatedly said that it will not accept such a technical defense in a border dispute between sovereign States, absent compelling reasons; (B) that the border dispute between Kentucky and Ohio has never been authoritatively decided; and (C) that Ohio has not acquiesced in the *Handly* and *Indiana* decisions.

A. THIS COURT WILL DECIDE A BORDER DISPUTE BETWEEN STATES ON THE MERITS WHEREVER POSSIBLE.

Boundary disputes between sovereign States of the Union are essentially political in nature. See *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 750-751 (1838), and dissent by Chief Justice Taney, at pp. 752-754; cf. also *United States* v. *Tillamooks*, 329 U.S. 40, 45-46 (1946). Article 9 of the Articles of Confederation provided that a special court be drawn in each such instance, under a detailed and cumbersome procedure. The Constitution, however, specifically commits disputes between States to this Court's jurisdiction. Article III, Section 2, Clause 2.

Because of the delicate nature of such cases, this Court has consistently held that they are to be handled "with a view to public convenience and the avoidance of controversy." *Vermont* v. *New Hampshire*, 289 U.S. 593, 606 (1933), quoting *Handly's Lessee* v. *Anthony*, supra, 5 Wheat. at 383. The proceeding is equitable in nature, according to *Rhode Island* v. *Massachusetts*, 14 Pet. 210 (1840), but (p. 257),

> "it will be the duty of the court to mould the rules of chancery practice and pleading in such a manner as to bring this case to a *final hearing* on its *real merits*. It is too important in its character, and the interests concerned are too great to be decided upon the mere technicalities of chancery pleading." [A]nd in a case like the present, the most liberal principles of practice and pleading ought unquestionably to be adopted, in order to enable both parties to present their respective claims in their full strength.
>
> (Emphasis supplied.)

In *Virginia* v. *West Virginia*, 220 U.S. 1 (1910), this Court said (at p. 27):

> The case is to be considered in the untechnical spirit proper for dealing with a quasi international controversy, remembering that there is no municipal code governing the matter, and that this court may be called on to adjust differences that cannot be dealt with by Congress or disposed of by the legislatures of either state alone.*** Therefore we shall spend no time on objections as to multifariousness, laches, and the like, except so far as they affect the merits, with which we proceed to deal.***

In a later proceeding in the same case, West Virginia, over the objection of Virginia, sought leave to file a supplemental answer. *Virginia* v. *West Virginia*, 234 U.S. 117 (1913). This Court conceded that, under the circumstances of West Virginia's motion, the ordinary rules of procedure would render it impossible to grant the request, had it been made in a case between ordinary litigants. However, since the disputants were sovereign States, the Court said (234 U.S. at 121):

> We are of the opinion, however, that such concession ought not to be here controlling. As we have pointed out, in acting in this case from first to last the fact that the suit was not an ordinary one concerning a difference between individuals, but was a controversy between states, involving grave questions of public law, determinable by this court under the exceptional grant of power conferred upon it by the Constitution, has been the

guide by which every step and every conclusion hitherto expressed has been controlled. And we are of the opinion that this guiding principle should not now be lost sight of, to the end that when the case comes ultimately to be finally and irrevocably disposed of, as come ultimately it must, in the absence of agreement between the parties, there may be no room for the slightest inference that the more restricted rules applicable to individuals have been applied to a great public controversy, so that anything but the largest justice, after the amplest opportunity to be heard, has in any degree entered into the disposition of the case. This conclusion, which we think is required by the duty owed to the moving State, also in our opinion operates no injustice to the opposing state, since it but affords an additional opportunity to guard against the possibility of error, and thus reach the result most consonant with the honor and dignity of both parties to the controversy.

See also similar rulings in the same case at 222 U.S. 17 (1911) and 231 U.S. 89 (1913).

In the present case, the Commonwealth of Kentucky has suggested that she has a defense of estoppel to the amended complaint which the State of Ohio now seeks leave to file. An estoppel against a sovereign State is, of course, a defense which is technical in the extreme, and which will never be entertained except under the most extraordinary of circumstances.

Furthermore, the defense of estoppel is an affirmative

defense which must be raised by a responsive pleading." Here, there has been no responsive pleading to the amended complaint since Ohio has not yet been allowed to file it.

Finally, as we shall show in subsection (C), *infra*, the cases in which Ohio purportedly acquiesced in the holding of *Handly* and *Indiana* do not support that proposition.

We respectfully submit, therefore, that the above cited decisions of this Court require that Ohio be permitted, at the least, to file its amended complaint and that Kentucky be given time to plead in response thereto."

It may be, of course, that the facts, if ultimately allowed in evidence, will convince the Court that so many rights of Kentucky citizens have become fixed, in the territory in question, as to render a decision in Ohio's favor disruptive of the public convenience. That is what happened in the cases upon which the Report of the Special Master relies (Rep. 12-15). *Indiana* v. *Kentucky*, *supra*; *Michigan* v. *Wisconsin*, 270 U.S. 295 (1926); *Vermont* v. *New Hampshire*, 289 U.S. 593 (1933); *Maryland* v. *West Virginia*, 217 U.S. 1 (1910); *Louisiana* v. *Mississippi*, 202 U.S. 1 (1906); *Virginia* v. *Tennessee*, 148 U.S. 503 (1893); *Rhode Island* v. *Massachusetts*, 4 How. 591 (1846). But in none of those cases did the Court dispose of the question on the pleadings alone. There were lengthy evidentiary hearings and voluminous records, and the Court was persuaded by the

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[15] See Rule 8(b) and (c) and Rule 12(b), Federal Rules of Civil Procedure; 5 Wright and Miller, Federal Practice and Procedure §§ 1270, 1271. Although the Federal Rules of Civil Procedure are not controlling, this Court looks to them for guidance in cases over which it has original jurisdiction. Rule 9 (2) of this Court's Rules; *Utah* v. *United States*, 394 U.S. 89, 95 (1968).

[16] See also Rule 15(a), Federal Rules of Civil Procedure, which provides that a request to amend a pleading "shall be freely given when justice so requires." See 6 Wright & Miller, Federal Practice and Procedure, § 1484.

evidence that the rights of individual citizens in disputed land had become fixed over many years." Here, we are concerned with a river, and, as we understand it, there are only three small islands in the whole course of that River between Kentucky and Ohio. Furthermore, there is no evidence. There is no record. There are not even pleadings to bring to issue before the Court Ohio's claim to a boundary in the middle of the River."

B. THE BOUNDARY DISPUTE BETWEEN KENTUCKY AND OHIO HAS NEVER BEEN AUTHORITATIVELY DECIDED.

The location of the boundary line between the territories which now constitute the Commonwealth of Kentucky and the State of Ohio is a question, (1) which the Continental Congress avoided by working out a compromise between many states with conflicting claims; (2) which the Constitutional Congress avoided in vague statutory language; and (3) which this Court has never previously been asked to answer.

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[17] See, however, U.S. v. Texas, 162 U.S. 1 (1895), in that case, an inaccurate map led Texas to claim, for many years, that its boundary with the Indian Territory (Oklahoma) was many miles west of its proper location, and language in an Act of Congress indicated acceptance of the erroneous boundary. However, in answer to the argument that the rights of Texas citizens had become fixed in the disputed territory, this Court held (162 U.S. at p. 39):

> "But whatever may be the facts bearing on this point, our duty is to determine the present issues according to the settled principles of law, without reference to considerations of inconvenience to individuals residing in the disputed territory.
>
> (Emphasis supplied.)

[18] And there is, of course, nothing to back up Kentucky's "intimation" of a prescription (see Statement, supra), which seems to have been given some weight in the recommendation of the Report that leave to amend the complaint be denied (Rep. 4, 14).

1. Shortly after the Declaration of Independence the permanence of the confederacy of the thirteen original States was seriously threatened by a dispute in the Continental Congress concerning the title to, and the disposition of, the lands north and west of the Ohio River which ultimately became the Northwest Territories. Virginia, New York, Massachusetts and Connecticut, relying upon original charter grants from the British Crown, presented to Congress conflicting claims of title either to the whole, or to parts, of these vacant western lands. Other States, whose western boundaries had been definitely fixed in their charters, notably Pennsylvania and Maryland, argued that title to the western lands lay in the Crown, and that it had devolved upon the United States at the signing of the Declaration of Independence. Maryland flatly refused to sign the Articles of Confederation until some satisfactory disposition should be made of the question. On November 3, 1781, a committee, appointed by Congress to study the various claims, submitted a report denying the validity of Virginia's claim and affirming the claim of New York. This report came before Congress for consideration on May 1, 1782, but no action was ever taken on it. Instead, Congress, fearful that the dispute would dissolve the confederacy of the States, refused to decide the issue of title, and urged all the States who had claims to the vacant lands to accept a compromise by ceding their claims to the United States for the common good. All, including Virginia, did so, leaving the question of Virginia's title, and, coincidentally, of its boundary in the Ohio River, undecided.[19] We have already

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[19] H.B. Adams, Maryland's Influence on Land Cessions to the United States, Johns Hopkins University Studies in History and Political Science, Third Series, Vol. III, pp. 7-54; Jensen, The Cession of the Old Northwest, 23 Mississippi Valley Historical Review, pp. 27-48; Jensen, Creation of the National Domain, 26 Mississippi Valley Historical Review, pp. 323-342; Hinsdale, The Old Northwest, pp. 206-254.

noted, in the previous Section of this brief, that the Continental Congress, in providing for the government of the Northwest Territories by the Ordinance of 1787, simply described them as bounded by the Ohio River. 1 Laws of the United States 475, *supra*.

2. We have also pointed out in the previous Section, that, after the adoption of the Constitution in 1787, the early enactments of Congress avoided any mention of boundaries to the Ohio River, and spoke only of the lands north and west, as opposed to the lands south and east, of the River. See footnote 13, *supra*. Up to this point we are in accord with the conclusions of the Report of the Special Master (Rep. 3-4).

3. The Report concludes (Rep. 11-12), however, that the Kentucky-Ohio boundary has been settled by a series of cases in this Court, beginning with *Handly's Lessee* v. *Anthony*, *supra*, and followed by *Indiana* v. *Kentucky*, *supra*; *Henderson Bridge Co.* v. *Henderson*, 173 U.S. 592 (1899); and *Wedding* v. *Meyler*, 192 U.S. 573 (1904).[*]

But all of these cases involved the boundary line between Kentucky and Indiana. Ohio, not being a party to any of them, is of course not bound by what they decided.

Furthermore, the middle of the River issue which Ohio now seeks to raise, was never properly before this Court in any of the Indiana-Kentucky cases. It has already been noted in the previous Section, that the *Handly* case was a contest between two private parties; that this Court's conclusion, that the Indiana-Kentucky border lay at the low water line on the north, was based on an assumption of Virginia's ancient title to the northern shore; and that the Indiana party made no effort to challenge this assump-

[*] This was the position taken in our original complaint.

tion, which was irrelevant to the outcome in any event. An examination of this Court's record in *Indiana* v. *Kentucky* (No. 2, Original, 1889 Term) shows that, when the evidence was heard by commissioners appointed by the Court, the only issue appeared to be whether the tract in question lay above, or below, the low water line on the Indiana shore. Upon argument before this Court, however, Indiana urged, without having laid any foundation in the record, that her boundary extended to the middle of the River. 136 U.S. at pp. 486-493. The Court brushed the contention aside by reference to its decision in *Handly*, 136 U.S. at pp. 505-508, and made the same assumption that Kentucky's territory extended to the low water mark on the north because she had "succeeded to the ancient right and possession of Virginia,***." 136 U.S. at p. 508. These two decisions were followed without discussion or reexamination in the *Henderson Bridge* and *Meyler* cases.

Finally, the principles underlying Virginia's claim of title, simply assumed in *Handly* in 1820 and accepted without question in the three later cases, had been carefully examined in depth by this Court in 1832 with quite different results. *Worcester* v. *Georgia*, *supra*. The opinions in both *Handly* and *Worcester* were written by Chief Justice Marshall.

In *Handly* there was, of course, no inquiry into the nature of Virginia's title. No challenge was raised, and a reference to the charter was considered sufficient. 5 Wheat. at pp. 376-377. We have seen, however, that Virginia's 1609 charter had been revoked; that her western boundaries had been sharply curtailed by the Proclamation of 1763, the Treaty of Fort Stanwix, and the Quebec Act; and that the British Crown had reserved the lands north and west of the River for the Indian Nations.

In *Worcester*, the State of Georgia sought to enforce

its laws within an Indian reservation, established by treaty with the United States, which clearly lay within Georgia's chartered limits. Chief Justice Marshall's opinion holds that title to the lands in question lay, not in the State of Georgia, but in the Cherokee Nation; and that Georgia's effort to enforce her laws within the Cherokee boundaries was unconstitutional. The opinion holds that the charter granted by the British Crown conveyed no title to the lands described therein, but a mere privilege of pre-emption. 6 Pet. at p. 544.

Soon after Great Britain determined on planting colonies in America, the king granted charters to companies of his subjects who associated for the purpose of carrying the views of the crown into effect, and of enriching themselves. The first of these charters was made before possession was taken of any part of the country. They purport, generally, to convey the soil, from the Atlantic to the South Sea. This soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea, that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The crown could not be understood to grant what the crown did

not affect to claim; nor was it so understood. (6 Pet. at pp. 544-545.)

If Georgia had no title to land which lay *within* her chartered bounds but had been reserved for the Cherokee Nation, then clearly Virginia had no title to the territories north and west of the Ohio River which lay *outside* her limited boundaries. In the light of the foregoing, *Handly* and its progeny cannot be considered authoritative decisions as to the location of the Kentucky-Ohio boundary.[21]

C. OHIO HAS NOT ACQUIESCED IN THIS COURT'S DECISIONS ON THE INDIANA-KENTUCKY BOUNDARY.

As has been noted in the Statement above, the Special Master's recommendation against allowance of leave to amend rests essentially on three old cases in The Supreme Court of Ohio (Rep. 9-12). These are *Lessee of McCullock* v. *Aten*, 2 Ohio Rep. 307 (1825); *Lessee of Blanchard* v. *Porter*, 11 Ohio Rep. 138 (1841); and *Booth* v. *Hubbard's Adm'r.*, 8 Ohio St. 244 (1858). We respectfully submit that they do not support the recommendation.

The first, *McCullock* v. *Aten*, did not involve the Ohio River. McCullock and Aten owned adjacent tracts, their respective titles being derived from the same grantor. The deeds described the common boundary as "down the creek with the several meanders thereof." It was clear that the creek itself had been granted to Aten, and the question was, what was the extent of the creek? Aten argued that

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[21] For the gradual change, from *Handly* to *Worcester*, in Chief Justice Marshall's views of the relationship between charters and Indian titles, see also *Johnson* v. *McIntosh*, 8 Wheat. 587 (1823); *Cherokee* v. *The State of Georgia*, 5 Pet. 15 (1831); Haines, *The Role of the Supreme Court in Government and Politics 1789-1835*, pp. 524, 596-606.

it extended to the top of the bank on McCulloch's side. The latter, in turn, contended that the stream reached only to the low water mark. This was exactly the situation in *Handly's Lessee v. Anthony*, supra, in which the Kentucky party argued for the top of the bank, and the Indiana party, for the low water mark. In explaining the basis of its decision for McCulloch, the Ohio Supreme Court said (2 Ohio Rep. at p. 310):

> "The state is bounded by the Ohio river: but it can scarcely be supposed that the beach, below the brink of the bank, is not within her jurisdiction. In the case of *Handly's Lessee* v. *Anthony*, 5 Wheat. 374, this doctrine is distinctly recognized, by the Supreme Court of the United States, as a rule of boundary, and it is one to which this court has always adhered.

The case has nothing to do with the Kentucky-Ohio boundary and *Handly* is cited only as authority on the point that the beach between the low water mark and the top of the bank cannot be considered a part of the stream.

The second case, *Blanchard v. Porter*, supra, did involve a tract of land on the Ohio River bank. Again, however, two private parties were involved; and, again, the dispute arose over the beach between the low and the high water marks, the sole question being whether the owner could convey title to the beach, or whether it was part of the River in which the public had an interest because of the provision in the Ordinance of 1787 making the Ohio River a public highway. The court, in order to show what was *not* a question in the case, said (11 Ohio Rep. at p. 142):

"***Nor is it a question, whether the deed to the plaintiff conveys the land and water, to the centre of the river, since Virginia only granted the territory on the northern bank of the river, to low water mark; although, by the compact of 1792, between Virginia and Kentucky, a *concurrent jurisdiction* over the river is accorded to Ohio and Kentucky,***. (Emphasis in original.)

Again, this case has nothing to do with the Kentucky-Ohio boundary and is concerned only with what can be said to be the extent of a stream upon its margins.

The third case, *Booth* v. *Hubbard's Adm'r.*, *supra*, was a suit for damages arising out of a drowning in the Ohio River, which concededly had occurred above the low water mark on the Ohio side. Once again, the real dispute was over the marginal extent of the River. Did it extend to the top of the bank on the Ohio side, or only to the low water mark? The defendant wanted the jury instructed that they should return a verdict in his favor if they found that the accident had happened on the Virginia (now West Virginia) side of the top of the bank on the Ohio shore. The plaintiff, however, prevailed and the trial court told the jury that they should find for the plaintiff if the drowning took place inside the low water mark on the Ohio side. In view of the concession that the deceased was drowned inside the low water mark, the Ohio Supreme Court held that the defendant was not prejudiced by the giving of the plaintiff's instruction. The Ohio boundary, the court said, extended into the River at least to the low water mark. But, the court added (8 Ohio St. at pp. 245-246),

> It does not become necessary, in this case, to determine whether the middle of the Ohio River, 'the ordinary medium stream', does or does not constitute the boundary line between the states of Virginia and Ohio. For all the purposes of this case, it may be assumed that Virginia was the original, undisputed owner of the territory on both sides of the river, and still retains all that she did not part with by her deed of cession in 1784.***

The opinion goes on to note that this Court had itself made a similar assumption in *Handly*. We fail to see how this case can be said to show Ohio's acquiescence in the *Handly* assumption since the opinion specifically finds it unnecessary to reach that question.

All of these three cases upon which the Report relies were disputes between private parties. The State of Ohio was not involved in any of them, and the most that can be said is that two of them decide that Ohio's southern boundary in the Ohio River extends, *at least*, to the low water mark on the Ohio shore. The middle of the River issue which Ohio now seeks to raise by the proposed amended complaint was not an issue in any of them, and it has never before been litigated by the Commonwealth of Kentucky and the State of Ohio. In view of the fact that boundary disputes between states will be decided on the merits whenever possible, and in view of the erroneous foundation of *Handly* and the other Indiana-Kentucky cases, we respectfully submit that the three cases on which the Report relies provide no proper basis for a denial of Ohio's motion for leave to file the amended complaint.

Furthermore, there are other cases which indicate that Ohio has never acquiesced in *Handly*. The Report itself

refers (Rep. 10-11) to two later cases in The Supreme Court of Ohio in which the middle of the River issue, though argued by the parties, was not reached by the court because unnecessary to the decision. *Sebastian* v. *Covington & Cincinnati Bridge Co.*, 21 Ohio St. 451, 452, 456 (1871); *Covington & Cincinnati Bridge Co.* v. *Mayer*, 31 Ohio St. 317, 326-329 (1877). And in *Indiana* v. *Kentucky*, *supra*, the brief for the State of Indiana, filed in 1889, pointed out that the State of Ohio claimed that its boundary line with Kentucky lay in the middle of the Ohio River, and that Ohio regarded Chief Justice Marshall's language on that aspect of the *Handly* case as *dicta*. 136 U.S. at p. 490; and see the brief in this Court's records, pp. 15-25.

Ohio's position has been most thoroughly presented in an extraordinary argument presented to the General Court of Virginia in *Commonwealth* v. *Garner*, 44 Va. 655 (1846), by one of the greatest of Ohio's early lawyers, Samuel F. Vinton. In the *Garner* case citizens of Ohio had been indicted by Virginia for aiding slaves to escape across the Ohio River. Mr. Vinton, who had been asked by the Governor of Ohio to represent the defendants, contended that the boundary lay in the middle of the River, and that the alleged criminal acts had taken place in Ohio territory. The Virginia court held that, under this Court's decision in *Handly*, the boundary lay at the low water mark on the Ohio side; but, since the jury had found that the alleged acts occurred *above* the low water mark, the court held that they took place in Ohio, rather than in Virginia, and the indictment was dismissed. Ohio, of course, had nothing from which to appeal.

Mr. Vinton's lengthy argument has been reprinted several times, most recently in 4 Ohio Archeological and Historical Publications 64-126. The various opinions of the

Virginia Judges in the *Garner* case cover over 120 pages of the reporter's volume (44 Va. 655-780), but they do not give a true picture of Mr. Vinton's argument. It is interesting to note that the Commonwealth of Virginia was also dissatisfied with Chief Justice Marshall's opinion in *Handly*. Virginia argued that its boundary ran to the top of the bank on the Ohio side.

CONCLUSION

For the reasons stated it is respectfully submitted that the motion for leave to file an amended complaint should be granted, and that the Commonwealth of Kentucky should be given time to file an answer.

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AUGUST 1972.

CERTIFICATE OF SERVICE

I, Joseph M. Howard, Executive Assistant to The Attorney General of The State of Ohio, a member in good standing of the Bar of The Supreme Court of the United States, hereby certify that on the 14th day of August, 1972, I served copies of the foregoing Exceptions of the State of Ohio and Brief in Support of Exceptions, by first class mail, postage prepaid, to the Office of the Governor and Attorney General, respectively, of the Commonwealth of Kentucky.

JOSEPH M. HOWARD
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to the Attorney General
of The State of Ohio